APPENDIX I

OPINION OF COURT OF APPEALS FOR FOURTH CIRCUIT

PER CURIAM:

This is an appeal in an action instituted by Negro citizens of Virginia against the Department of Conservation and Development, Division of Parks, of the Commonwealth of Virginia and the individual park commissioners to enjoin threatened racial discrimination in the operation of Seashore State Park. Decree was entered therein enjoining the defendants, their "agents, lessees and successors in office" from denying to "any person of the Negro race, by reason of his race and color, the right to use and enjoy the facilities" of the park. The decree further provided "that if said Park or any part thereof is leased, the lease must not, directly or indirectly operate so as to discriminate against the members of any race." The defendants have appealed complaining especially of the provision last quoted.

We think that the decree appealed from is correct for reasons adequately stated in the opinion of the District Judge and that little need be added thereto. See 133 F. Supp. 53. It is perfectly clear under recent decisions that citizens have the right to the use of the public parks of the state without discrimination on the ground of race. *Dawson et al* v. *Mayor and City Council of Baltimore* 4 Cir. 220 F. 2d 386, aff. 350 U. S. 877; *Holmes* v. *Atlanta* 350 U. S. 879. And we think it equally clear that this right may not be abridged by the leasing of the parks with ownership retained in the state. See *Lawrence* v. *Hancock* 76 F. Supp. 1004, 1009; *Muir* v. *Louisville Park Theatrical Ass'n* 347 U. S. 971. And it is no ground for abridging the right that the parks cannot be operated profitably on a non segregated

basis. Since the park here could not be operated profitably on such basis and leasing was being contemplated for that reason, it was proper to insert in the decree a provision which would protect the rights of plaintiffs in the event of lease. Cf. *Regal Knitware Co.* v. *N. L. R. B.* 324 U. S. 9, 14-16. As said by the District Judge:

> "The short answer to the argument advanced by defendants, that there is insufficient evidence to justify a permanent injunction based upon future threatened irreparable injury, lies in the testimony of the Director (Long) in that he admits that Seashore State Park cannot be operated profitably on an 'unsegregated' basis by the Department of Conservation and Development. While this Court is inclined to agree with this statement, if this be true, it stands to reason that no individual may operate the park at a profit without enforcing segregation. Should the successful lessee elect to admit Negroes only, then the members of the white race have just cause to complain. If it is operated for the benefit of only the members of the white race, the Negroes may complain. Accordingly, the defendants are required to elect to operate on a non-discriminatory basis, or, if leased, to see that the park is operated by the lessee without discrimination."

There is no merit in the contention of appellants that the decree appealed from is too vague and indefinite.

Affirmed.

APPENDIX II

FINAL DECREE OF DISTRICT COURT

This cause came on this day to be heard upon the pleadings filed herein, the stipulations of counsel, the evidence heard in open court, and was argued by counsel.

It appearing to the Court that all parties are properly before said Court and that the plaintiffs have presented a proper case to enjoin the defendants from denying the use of the recreational facilities of the Seashore State Park; and it further appearing to the Court that the prayer of said plaintiffs to enjoin the defendants, their lessees, their agents and their successors in office, from denying to said plaintiffs and other persons of a similar class and similarly situated the use and enjoyment of the Seashore State Park and its recreational facilities is proper;

It is ADJUDGED, ORDERED and DECREED that the Department of Conservation and Development of the Commonwealth of Virginia, its Director, agents, lessees and successors in office, are hereby permanently enjoined and restrained from denying any person of the Negro race, by reason of his race and color, the right to use and enjoy the facilities at Seashore State Park; it is further ADJUDGED, ORDERED and DECREED that if said Park or any part thereof is leased, the lease must not, directly or indirectly, operate so as to discriminate against the members of any race.

The Clerk will assess the costs in this proceeding against the defendants herein, said costs to include an item of $23.10 due to the Court Reporter for her services in preparing the transcript in accordance with an order of this Court.

(s) WALTER E. HOFFMAN
United States District Judge

October 6, 1955
Norfolk, Virginia

Office - Supreme Court, U.
FILED
AUG 6 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 238

DEPARTMENT OF CONSERVATION AND DEVELOPMENT, ETC., *et al.*,

Petitioners,

v.

LAVINIA G. TATE, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari filed herein fails to state any recognizable grounds for review by this Court of the judgment of the United States Court of Appeals for the Fourth Circuit.

Judgment Sought To Be Reviewed

Petitioners are seeking to have this Court Review the United States Court of Appeals for the Fourth Circuit's affirmance of an order of the District Court for the Eastern District of Virginia, which provides:

> It is ADJUDGED, ORDERED and DECREED that the Department of Conservation and Development of the Commonwealth of Virginia, its Director, agents, lessees and successors in office, are hereby permanently enjoined and restrained from denying any

> person of the Negro race, by reason of his race and color, the right to use and enjoy the facilities at Seashore State Park; it is further ADJUDGED, ORDERED and DECREED that if said Park or any part thereof is leased, the lessee must not, directly or indirectly, operate so as to discriminate against the members of any race. (Petition for Writ of Certiorari, Appx. H.)

Only the latter command of this order is questioned; and petitioners here, as in the courts below, contend that authority for it does not exist in either the applicable case law or the facts of this case (Petitioners' Brief, p. 13).

Reasons Why the Writ Should Not Be Granted

1. *The disputed section of the order is amply supported by the findings of fact.*

The disputed section of the order rests upon findings of fact which are summarized in the opinion of the District Court in the following language, 133 F. Supp., at 55, 56:

> It is interesting to note that there was no *specific* consideration given to leasing any of the state parks until after the pre-trial conference on November 5, 1954. According to Long there had been some general discussion in April, 1953, on the subject of competition with private enterprise occasioned by the use of cabins for overnight accommodations. Since the State operated all parks in 1954 on a so called competitive basis and, during the 1955 season, has elected to similarly operate all parks excepting the one which is the subject matter of this action, it may be fairly assumed that the State has not yet given serious consideration to the abolition of any such competition, if any, with private enterprise. The State elected not to operate Seashore State Park, although the Court's preliminary injunction only restrained the leasing of the Park and its facilities.
>
> * * *

> With all due respect to the able leaders of this Commonwealth, it is perfectly apparent to the Court that the fundamental reason for the contemplated leasing lies in the problem of use by members of all races. It is probably true that financial reasons are paramount, but the potential financial loss is brought about by the decisions of many courts, State and Federal, universally holding that property acquired, maintained and operated by the Federal, State and local governments shall be made equally available to all races, subject to reasonable rules and regulations. The proposed "negotiated lease" effectively vests in the hands of a small group the power to accomplish by indirection exactly what all Court have said cannot be done. The control exercised in a "negotiated lease" through the medium of "selecting" the lessee is as powerful as the actual words of any written lease.

We submit that the findings summarized above are not only amply supported by the evidence but are incontrovertible on the record.

On review the Court of Appeals agreed with the District Court and approved the findings of fact by quoting the following finding of the District Court:

> The short answer to the argument advanced by defendants, that there is insufficient evidence to justify a permanent injunction based upon future threatened irreparable injury, lies in the testimony of the Director (Long) in that he admits that Seashore State Park cannot be operated profitably on an "unsegregated" basis by the Department of Conservation and Development. While this Court is inclined to agree with this statement, if this be true, it stands to reason that no individual may operate the park at a profit without enforcing segregation. Should the successful lessee elect to admit Negroes only, then the members of the white race have just cause to complain. If it is operated for the benefit of only the members of the white race, the Negroes

may complain. Accordingly, the defendants are required to elect to operate on a non-discriminatory basis, or, if leased, to see that the park is operated by the lessee without discrimination (Petitioners' Brief, Appx. I).

2. *The disputed section of the order neither presents an important Fourteenth Amendment question nor conflicts with the decisions of this Court so as to call for an exercise of the supervisory powers of this Court.*

The provision in the order of which petitioners complain neither presents an important Fourteenth Amendment question nor conflicts with any applicable decision of this Court so as to call for the exercise of the Court's supervisory powers. Argument on these grounds would appear to be foreclosed by *Muir* v. *Louisville Park Theatrical Association*, 347 U. S. 971. Indeed, petitioners have made no effort to distinguish this decision relied on by both of the Courts below.

Moreover, the effort of petitioners to question the State instrumentality concept of state action is hardly apropos in view of the current case authority. See, *Nixon* v. *Condon*, 286 U. S. 73; *Smith* v. *Allwright*, 321 U. S. 649; *Shelley* v. *Kraemer*, 334 U. S. 1; *Terry* v. *Adams*, 345 U. S. 461. See also *Fleming* v. *South Carolina Electric & Gas Co.*, 224 F2d 752 (CA 4th 1955), appeal dismissed, — U. S. —, 100 L. ed. (Advance p. 533); *Kerr* v. *Enoch Pratt Free Library*, 149 F2d 212 (CA 4th 1945); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948); *Kern* v. *City Commissioners of Newton*, 151 Kan. 565, 100 P2d 709 (1940); *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948). *Lincoln Park Traps* v. *Chicago Park Dist.*, 323 Ill. App. 107, 55 N. E. 2d 173 (1944); *Davis* v. *City of Atlanta*, 84 Ga. App. 572, 66 S. E. 2d 188 (1951).

Similarly, the propriety of the disputed section of the decree is not only justified by the findings but is amply sup-

ported by the authorities. See, e. g., *Regal Knitware Co. v. National Labor Relations Board*, 324 U. S. 9, 14; *In re Lennon*, 166 U. S. 548; *International Brotherhood v. Keystone F. Lines*, 123 F2d 326, 329 (CA 10th 1941); *Alemite Mfg. Co. v. Staff*, 42 F2d 832 (CA 2d 1930). And see Anno: 40 ALR 2d 592.

CONCLUSION

For the reasons hereinbefore stated, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Dated: August 3rd, 1956.